No. 319

# In the Supreme Court of the United States

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*v.*

EDGAR B. SIMS ET AL.

*ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT*

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# INDEX



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### INTRODUCTORY

In our principal brief we argued that the District Court properly approved the Debtor's petition and that the Circuit Court of Appeals committed error in reversing that determination, because the interests of creditors would best be subserved by administration of the assets under Chapter X. This brief is devoted to replying to the contention that the courts below *cannot* administer the assets held by state representatives.

That contention is made in various forms in the briefs of the Wisconsin, Iowa, Maryland, and West Virginia respondents and in the brief filed by representatives of 17 states as *amici curiae*. It was not passed on by the court below.

In summary, our position is as follows:

We do not contend that the rights created by the state deposits are destroyed or entirely superseded by the reorganization proceedings. We expressly concede that the state deposit laws are valid. We expressly concede that the rights created thereunder must be recognized and protected in the reorganization under the rule of *Case* v. *Los Angeles Lumber Products Co., Ltd.*, 308 U. S. 106, and *Consolidated Rock Products Co.* v. *DuBois*, 312 U. S. 510.[1]

The District Court recognized that rights created under the state deposit statutes should be preserved. The court said (R. 487):

> I have been able to see nothing in the petition which says that any vested rights of any contractholders are to be modified or need to be modified. My understanding of the allegation of the petition is that the contracts, the executory contracts of the company, contain provisions that the company cannot meet, and that in order

[1] Compare *In re Rosett*, 204 Fed. 431 (C. C. A. 2), where the State Comptroller of New York was required to surrender a deposit to the bankruptcy court but the preferences created under state law were recognized in bankruptcy.

> for any reorganization those executory contract provisions must be modified; but certainly there is no indication there that any vested rights in any deposits are going to be affected at all, and the Court would not permit that if there was any such thing contemplated. * * *

We do contend that the property on deposit remains the property of Fidelity, and that the *remedies* provided under the state deposit statutes for realization on the deposit are superseded by the bankruptcy power exercised under Chapter X of the Bankruptcy Act. Neither the Tenth nor the Eleventh Amendment precludes resort to the remedial procedures provided under the Bankruptcy Act in lieu of the remedies provided by state statutes or by contract.

A. THE DEPOSITED PROPERTY REMAINS FIDELITY'S PROPERTY OVER WHICH THE DISTRICT COURT HAS JURISDICTION

1. The assets on deposit with the state officials are Fidelity's assets. The state statutes vary in form, but there cannot, we submit, be any doubt that the deposits are for *security* purposes. The deposits are not themselves payments which reduce liability on the contracts, and upon full compliance with its contracts in any state Fidelity is entitled to a return of the deposit made in that state. In these circumstances, the deposits are Fidelity's assets, deposited by way of pledge

or mortgage, and this is so whether or not title to the deposited securities has been assigned.

To illustrate: In the domiciliary state of West Virginia (which holds about half of all the deposits), the statute (W. Va. Code, Ch. 33, Art. 9, sec. 3 [2]) requires the amount specified to be deposited "in trust, for the benefit of its contract holders." The purpose of this deposit is indicated by two other sections which empower the Insurance Commissioner (1) to revoke the license of the company and retain control of the deposit or a sufficient amount thereof until the total liability on all contracts issued by such company in this state is redeemed or settled (W. Va. Code, Ch. 33, Art. 9, sec. 10); and (2) to file a bill for the administration of its assets, for the purpose of taking possession of its property in this state, and for the distribution of its assets among those entitled thereto according to their respective rights (W. Va. Code, Ch. 33, Art. 2, sec. 45). *Sims* v. *Homeseekers Fire Ins. Co.*, 117 W. Va. 84, 183 S. E. 869 (1936).

These are the Insurance Commissioner's only alternatives in dealing with the deposited property upon insolvency of the company. The statutes give him no authority like that possessed by the sinking fund custodian in *Warder* v. *Brady*,

[2] The Tennessee, Wisconsin, and other statutes are similar. All statutes cited are set out in the appendices to our main brief.

115 F. (2d) 89 (C. C. A. 4), on which respondents rely.[1]

In the *Brady* case, when the company made a payment into the sinking fund, the payment reduced *pro tanto* the company's indebtedness to its bondholders. The deposit was accepted as payment. Hence, the court in that case found that a payment of money into the sinking fund "amounted to an appropriation [thereof] * * * to the purpose specified, so that the corporation parted with all title thereto." The deposit of property by Fidelity had no such effect, and it is that fact which distinguishes this case from the case of *Warder* v. *Brady*. Fidelity remained personally liable in the full amount of its contracts, and its contract holders looked to it as their primary source of payment. Obviously, it could not plead the value of its deposit as partial payment in a suit by a contract holder. In fact, Fidelity has always paid its contract holders directly and

[1] *In re Prudence Co., Inc.*, 82 F. (2d) 755 (C. C. A. 2), certiorari denied, 298 U. S. 685 (Md. Brief, p. 29), clearly rests on the fact that The Prudence Company, Inc., the debtor, was only the guarantor of the obligation for which the securities sought to be administered were pledged. The decision does not support the contention that collateral may not be administered in reorganization proceedings involving the corporation which is the primary obligor. This is shown by the fact that the court cited with approval *In re Prudence Bonds Corp.*, 79 F. (2d) 205, where it was held that the collateral could be administered in the reorganization of the principal obligor.

they have never had recourse to the fund. Had Fidelity completely paid its contract holders, it would have been entitled to a return of the deposited property. Certainly, any surplus would be neither the property of the state of West Virginia nor that of its officials; nor would it (as respondents have suggested, W. Va. Brief below, p. 61), be divided among contract holders whose contractual claims had been fully paid because that would be contrary to the explicit provisions of the statute and the contracts. In short, the property deposited is, at most, collateral security for the claims of contract holders and the deposit did not divest the company of its interest in the property. Cf. *United States* v. *Knott*, 298 U. S. 544, 550.

In Maryland the statute goes beyond the West Virginia and other statutes, but there is no difference in legal effect. Section 222 of Article 48A of the Annotated Code of Maryland (1939 ed.) requires that the company "shall have assigned to and deposited (securities) with the Commissioner * * * in trust, as security for all the holders of contracts * * * bonds * * * or other securities * * *." The provision for assignment does not change the fact that the deposited securities remain property of Fidelity deposited to secure its obligations. Legal title frequently passes in pledges. And it is customary in real estate mortgage indentures to "convey, bargain, sell, assign * * *" the

property to a trustee. There, as under the Maryland statute, the grantor is a residuary beneficiary of the trust. But clearly in such cases the property remains that of the grantor, subject to administration in its reorganization proceedings.

This was recognized in *In re Bajardi*, 8 F. (2d) 551 (S. D. N. Y.), affirmed, 9 F. (2d) 797 (C. C. A. 2). The statute there, in language like that in the Maryland Act, required every private banker to "transfer and assign to the superintendent of banks registered stocks or bonds * * *. Such stocks or bonds shall be registered in the name of the superintendent of banks officially as trustee for the depositors with such private banker * * *." See 9 F.(2d) 797. The statute involved in the *Bajardi* case further provided:

> Such stocks or bonds shall be registered in the name of the superintendent of banks officially as trustee for the depositors with such private banker, subject to sale and transfer and disposal of the proceeds thereof by the superintendent only upon the order of a court of competent jurisdiction * * *.

This is again similar to Section 224 of the Maryland statute, which provides:

> All deposits * * * shall be held by said Commissioner subject to sale and transfer and to the application of the proceeds of any such sale only on the order of a court of competent jurisdiction.

The district court in the *Bajardi* case held that the bankruptcy court in the administration of the assets was a "court of competent jurisdiction" with power, under the statute, to direct the Superintendent in the administration of the assets. The circuit court of appeals, despite the fact that the securities deposited with the Superintendent of Banks were registered in his name, recognized that they belonged to the bankrupt and summarily required their surrender to the bankruptcy court. It said (p. 799):

> The very purposes for which the deposit is required by the statute are sufficient to show that the stocks, etc., were regarded by the Legislature as the *property of the banker* for the payment of his debts to a specified class of creditors. [Italics supplied.]

2. The mere existence of the lien or other specific interest of the contract holders in the deposits does not preclude the exercise of jurisdiction over them by the court in reorganization proceedings under Chapter X. Even in "straight" bankruptcy proceedings, property pledged or mortgaged by the Debtor to secure its obligations is subject to the jurisdiction of the bankruptcy court. *Isaacs* v. *Hobbs Tie & Timber Co.*, 282 U. S. 734; *In re Schulte United, Inc.*, 49 F. (2d) 264 (C. C. A. 2). But in "straight" bankruptcy, liens cannot be affected, and accordingly property held by a mortgagee or pledgee or receiver cannot be

drawn into the possession of the bankruptcy court, except in circumstances not now material. In reorganization proceedings under Section 77B and Chapter X, the court's powers over such property are much broader. *Continental Illinois National Bank & Trust Co.* v. *Chicago, Rock Island & Pacific Ry. Co.*, 294 U. S. 648; *Warder* v. *Brady*, 115 F. (2d) 89 (C. C. A. 4); *In re Prudence Bonds Corp.*, 55 F. (2d) 262 (C. C. A. 2); *In re Prudence Bonds Corp.*, 77 F. (2d) 328 (C. C. A. 2). As the court below said in *Warder* v. *Brady* (p. 95):

> The bankruptcy court in reorganization proceedings under § 77B, 11 U. S. C. A., § 207, had, and under Ch. X of the 1938 Act now has a wider control, that comprehends not only property of the debtor in his actual or constructive possession, but also property of the debtor in the hands of lien holders. The formulation of a plan of reorganization contemplates a readjustment of secured as well as unsecured debts, and so the summary power of the court extends to all of the debtor's property that can be affected by a plan, whether or not the property is in his possession. * * *

The jurisdiction exercised by the district court is precisely that which the court in *In re Prudence-Bonds Corp.*, 77 F. (2d) 328 (C. C. A. 2), described as proper (p. 330):

> The court of reorganization can bring within its jurisdiction property covered by mortgage or pledge, when a plan covering it

has been adopted and confirmed. And prior thereto, property held by a pledgee, in which the debtor has an equity, is likewise within the court's jurisdiction, so as to prevent a disposition by foreclosure of the pledge or mortgage. For the purpose of reorganization, the court should take complete charge of property in order that it may from the beginning, and through all the intermediate steps of reorganization, so administer the property as to achieve the desired rehabilitation.

3. The fact that Fidelity is insolvent, and that the deposits are insufficient to pay the claims which they secure, does not destroy Fidelity's interest therein. Inadequacy of the deposit does not, without appropriate legal proceedings, act as a strict foreclosure or otherwise operate to divest Fidelity of its interest in the property. Moreover, insolvency does not alter the status of the property as collateral security for the debtor's personal obligations to its contract holders.[4]

4. Respondents are subject to summary orders of the district court with regard to property in their possession, because they are not adverse claimants. The mere assertion of an adverse claim does not oust the jurisdiction of the bankruptcy

[4] See *In re Prudence Bonds Corp.*, 79 F. (2d) 205, 209 (C. C. A. 2), where the argument was rejected that when the debtor became insolvent, it lost all interest in the deposit and that the deposited collateral could not be reorganized as part of its property.

court unless the claim is colorable. *Harrison* v. *Chamberlin*, 271 U. S. 191; *Warder* v. *Brady*, 115 F. (2d) 89 (C. C. A. 4).

We submit that here there can be no more than a "mere assertion" of an adverse claim, "so unsubstantial and obviously insufficient * * * in law, as to be plainly without merit," and accordingly, the district court could properly "dispose of it summarily." *Warder* v. *Brady, supra,* at p. 92.

In *Continental Illinois National Bank & Trust Co.* v. *Chicago, Rock Island & Pacific Ry. Co.*, 294 U. S. 648, this Court rejected the contention that an order enjoining pledgees from selling collateral in their hands, pending the preparation and consummation of a reorganization plan, could not be entered summarily, saying (p. 681):

> * * * The bonds deposited as collateral were not in the hands of purchasers, but in the hands of creditors as security. That the equity which the debtor retained was a property interest, was not and could not be disputed by the creditors; nor was the claim of the creditors in respect of their rights in the collateral security or the rank of their liens questioned by the debtor. In short, no adverse claim was brought forward by either of the parties to the controversy. * * *

Assertions that state officials like the respondents are adverse claimants have been overruled even in cases where title was held to have vested in the state officials. *In re Bajardi*, 8 F. (2d) 551 (S. D.

N. Y.), affirmed 9 F. (2d) 797 (C. C. A. 2) *supra*, pp. 7–8; *Gamble* v. *Daniel*, 39 F. (2d) 447 (C. C. A. 8).

In *Gamble* v. *Daniel*, it was argued that the Department of Trade and Commerce of Nebraska, which had taken possession of a bankrupt trust company for liquidation, was an adverse claimant to the bankruptcy court. The court overruled the contention, holding that the Department was in the position of an assignee for creditors, and as such was subject to a summary order. It said (pp. 453–454):

> There is no dispute as to the character of the possession here. Appellant claims no right in himself in this property. He claims as the agent of the department of trade and commerce. The possession is only under the statutes of Nebraska * * *. *This is purely a liquidating statute.* The possession of appellant is alleged to be and is only as a "liquidating agent" under such statute. *Such statute is analogous, in purpose and effect, to state statutes governing assignments for the benefit of creditors. For the matter here involved, the possession of appellant is entirely analogous to that of an assignee for the benefit of creditors under state law. It has been directly determined that such assignee is not an "adverse" holder and may be required, by summary order, to turn over property so held to the bankruptcy official.* * * * [Citing cases, italics supplied.]

In *Hobbs* v. *Occidental Life Ins. Co.*, 87 F. (2d) 380 (C. C. A. 10), a federal court having jurisdiction over the equity receivership of an insurance company approved a reinsurance contract and summarily ordered the Commissioner of Insurance of Kansas to deliver a deposit (held in the custody of the state treasurer) to the reinsuring corporation.

The court on appeal by the Commissioner, rejected his contention that a plenary suit was necessary. It said (p. 384):

> * * * Where property is held by a third person, that is one not a party to the action and he makes a claim of right or title in himself or on behalf of some other person not a party, and such claim is adverse to that of the receiver, a plenary suit is necessary to recover possession. But the commissioner does not advance a claim of that kind. He puts forward a right of possession as trustee for persons who are bound by the proceedings taken in this action. An independent suit is not required in these circumstances. His claimed right of possession may be determined in summary manner in this case. * * *

The Maryland brief (pp. 36-37) seeks to distinguish the *Hobbs* case on the ground that there the court had approved a reinsurance agreement which bound all unpaid beneficiaries of the deposit, so that the purpose of the deposit had been fulfilled. But in this case any plan confirmed will similarly

bind all beneficiaries of the state deposits;[8] the state officials have no interest of their beneficiaries to protect which will not be protected by the reorganization court.[9]

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[8] On this question *Miles* v. *New South Building and Loan Association*, 95 Fed. 919 (C. C., N. D. Ga., 1899), cited in the *Hobbs* case, is in point. That case involved a receivership in which the trustee of a collateral bond issue was summarily ordered to surrender the collateral to the court. The trustee objected that it was an adverse claimant. The court held (pp. 921–922):

"* * * There seems to be no good reason why persons in possession of the assets of the corporation cannot be brought before the court by summary petition, and, if they admit the possession, and show no beneficial claim or title in themselves, be required to surrender such assets to the receiver. *The Company* [the trustee] *claims no ownership in the assets. Its claim is as trustee for others. The main suit is to settle an insolvent corporation, and the rights of all of the beneficiaries in the trust represented by the Company can be fully protected by the court in the case in which the receiver was appointed.* * * * The proceeds of the collection by the receiver of these claims will be held as a separate fund, subject to the same trusts that were impressed on the claims by the contracts under which they were held by the Company. The Company will not only be protected by the order of the court to surrender the assets, but will also be protected by subsequent orders applying the funds arising from the claims in strict conformity to the trusts under which the claims have been held by the Company." [Italics supplied.]

[9] The circumstance pointed out in the text also answers another argument suggested in the Maryland brief (p. 40, n.), that Fidelity's contracts with the state authorities are "contracts in the public authority," which the bankruptcy court may not reject under Sections 116 (1) and 216 (4) of the Bankruptcy Act (11 U. S. C. 516 (1) and 616 (4)). As the Maryland respondent admitted below, these provisions

B. NEITHER THE ELEVENTH NOR THE TENTH AMENDMENTS BAR THESE PROCEEDINGS IN RESPECT OF STATE DEPOSITS

1. The circumstance that the assets held as security in this case are held by state officials does not raise the Eleventh Amendment as a bar to the usual powers of the reorganization court to deal with these assets under the plan and to enjoin their disposition pending the proceedings.

Under the Eleventh Amendment the courts may not entertain a suit against a state; the respondents assert no personal claim to Fidelity's assets deposited with them, but claim rights there-

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were intended to deal with situations such as those involving contracts between a public utility and a state for the delivery of electric power, not situations like the present where the public authority appears as creditor or trustee for creditors. This is shown by the reorganization cases in which securities held by the Reconstruction Finance Corporation have been dealt with under plans of reorganization. See for instance, *Continental Illinois National Bank & Trust Co.* v. *Chicago, Rock Island & Pacific Ry. Co.*, 294 U. S. 648; *In re East Boston Coal Co.*, 30 F. Supp. 811 (M. D. Pa.).

Even if these provisions were applicable, this proceeding will involve no disaffirmance or rejection of the alleged contract with the Maryland Commissioner. Since the bankruptcy court undoubtedly has power to modify the claims of contract holders, and since, concededly, the Maryland Commissioner holds only for the benefit of contract holders, the bankruptcy court under the plan can satisfy the claims for whose satisfaction the Maryland Commissioner allegedly holds the securities. Surrender of the deposit to the court which can adjust rights in the underlying claims can in no event be considered a violation of the conditions of the alleged contract.

to only as agents of the States. But these factors do not bring the case under the Eleventh Amendment. This Court has uniformly recognized that when an individual is sued for the recovery of property and his jurisdiction for its retention rests on a claim asserted under state authority, he may not cut the suit short *in limine* by claiming immunity under the Eleventh Amendment; the suit may be maintained against his as an individual and his asserted claim of right under authority of his principal, the State, must be tried on the merits. Thus, this Court held in *In re Ayers*, 123 U. S. 443, 501, quoting from *Poindexter* v. *Greenhow*, 114 U. S. 270, 288:

> A defendant sued as a wrong-doer, who seeks to substitute the State in his place, or to justify by the authority of the State, or to defend on the ground that the State has adopted his act and exonerated him, cannot rest on the bare assertion of his defense. He is bound to establish it. * * *

The application of this principle is not limited to situations where the defendant is a "wrong-doer" in the sense that he is a malefactor. The principle is applicable whenever it is claimed that the defendant is acting without authority either because the governmental title upon which he relies is invalid, or because a state statute is unconstitutional, or because—as we shall show is true in this case—the state statute is superseded by paramount federal legislation.

The leading case is *United States* v. *Lee*, 106 U. S. 196.[1] Suit was begun in a Virginia state court against defendants Kaufman and Strong to recover possession of land used as part of Arlington National Cemetery. The case was removed to the federal court. The United States moved to dismiss the proceedings for lack of jurisdiction on the ground that the defendants held only as agents and officers of the United States. A demurrer to the motion was sustained and Kaufman and Stron appealed. This Court held that the defendants' assertion of a claim as agents of the United States entitled them to no immunity from suit. It declared:

> This examination of the cases in this court establishes clearly this result: that the proposition that when an individual is sued in regard to property which he holds as officer or agent of the United States, his possession cannot be disturbed when that fact is brought to the attention of the court, has been overruled and denied in every case where it has been necessary to decide it, and that in many others where the record shows that the case as tried below actually and clearly presented that defence, it was neither urged by counsel nor considered by the court here * * *" (106 U. S. at 215–216).

[1] That case involved an attempt to defeat a suit by pleading the immunity of the *United States* from suit, but the principle applies as well to claims based on the immunity of *states* under the Eleventh Amendment. *Tindal* v. *Wesley*, 167 U. S. 204, *infra*, p. 18.

Significantly, the Court quoted with approval *Davis* v. *Gray*, 16 Wall. 203, as follows:

> Making a State officer a party does not make the State a party, *although her law may have prompted his action, and the State may stand behind him as a real party in interest* (106 U. S. at 215). [Italics by the Court.]

*United States* v. *Lee* has never been questioned.* On nearly identical facts, but where the title asserted was on behalf of a state and the contention was under the Eleventh Amendment, the *Lee* case was followed in *Tindal* v. *Wesley*, 167 U. S. 204, 221, and it was stated that the "settled doctrine" of this Court rejects the argument that a suit to recover possession of property "is a suit against the State simply because the defendant holding possession happens to be an officer of the State and asserts that he is lawfully in possession on its behalf." See also *Ickes* v. *Fox*, 300 U. S. 82, 96; *In re Tyler*, 149 U. S. 164; *Cunningham* v. *Macon & Brunswick Railroad Co.*, 109 U. S. 446; *Poindexter* v. *Greenhow*, 114 U. S. 270; *Ex parte Young*, 209 U. S. 123; *Correa* v. *Barbour*, 71 F. (2d) 9 (C. C. A. 1); *Uebersee Finanz-Korporation Aktien Gesellschaft* v. *Rosen*, 83 F. (2d) 225 (C. C. A. 2).

In the instant case appellants hold property which is asserted to belong to the Debtor, and to which the trustee in bankruptcy of the Debtor

* No case can be cited to undermine the authority of *United States* v. *Lee* and *Tindal* v. *Wesley*. There are, of course,

claims the right of possession. They are sued as individuals in possession of this property. To justify their retention of this property as against the Debtor's trustee, they rely upon authority conferred by the state in exactly the same manner as did the officers of the United States in the *Lee* case and of South Carolina in the *Wesley* case. Unless that authority does in fact justify their conduct, respondents may not withhold the Debtor's property from the Debtor's trustee.

We submit that the state authority cannot justify respondents in withholding the property from the Debtor's trustee. The paramount jurisdiction of the bankruptcy court overrides the state statutes insofar as those statutes purport to permit state officers to retain the deposits and administer the assets, just as the bankruptcy power overrides the

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cases where the bar of the Eleventh Amendment was held to operate, but all of those which even remotely resemble the present case are cases in which the purpose of the suit was to compel compliance by the state with its own contract. Thus, in *Hagood* v. *Southern*, 117 U. S. 52, and *In re Ayers*, 123 U. S. 443, the suits sought to compel the states to accept their bond interest coupons in payment of taxes, as the states had agreed to do. So in *Cunningham* v. *Macon & Brunswick Railroad Co.*, 109 U. S. 446, the suit was to foreclose a mortgage on property owned by the state and the state was personally liable on its guarantee of the bonds secured by the mortgage. In *Lankford* v. *Platte Iron Works*, 235 U. S. 461, and *Farish* v. *State Banking Board*, 235 U. S. 498, the state had guaranteed bank deposits, just as the Federal Deposit Insurance Corporation does now; and the fund, like F. D. I. C. assessments, was designed to discharge the state's direct liability.

powers of receivers under foreclosure practice and equity practice and the powers of trustees in possession under mortgage indentures. *Cf. Chicago Title & Trust Co.* v. *4136 Wilcox Bldg. Corp.*, 302 U. S. 120; *International Shoe Company* v. *Pinkus*, 278 U. S. 261; *Stellwagen* v. *Clum*, 245 U. S. 605; *Globe Bank* v. *Martin*, 236 U. S. 288; *Tua* v. *Carriere et al.*, 117 U. S. 201; *In re Klein*, 1 How. at 277; *Ogden* v. *Saunders*, 12 Wheat. 212; *Hammond* v. *Lyon Realty Company*, 59 F. (2d) 592 (C. C. A. 4); *In re Bankshares Corporation of The United States*, 50 F. (2d) 94 (C. C. A. 2); *Albert Pick & Company* v. *Wilson*, 19 F. (2d) 18 (C. C. A. 8).

In closely related situations the lower federal courts have so held. *In re Bajardi*, 8 F. (2d) 551 (S. D. N. Y.) involved the bankruptcy of certain private bankers. Pursuant to the Banking Law of New York they had deposited with the Superintendent of Banks an amount equal to 10% of their total deposits, subject to sale and disposition of the holdings by the Superintendent on order of a court of competent jurisdiction. The district court held that the Superintendent was required to deliver the assets to the bankruptcy trustee. It said:

> Jurisdiction of the United States court to adjudge private bankers bankrupt and to administer their estates in bankruptcy is not only paramount, but is exclusive, and state laws assuming to confer upon state

> officers or courts authority to administer such bankrupt estates are superseded, and must give way when the Bankruptcy Act is properly invoked. * * *

The decision of the District Court was affirmed in *In re Bajardi*, 9 F. (2d) 797 (C. C. A. 2). The contention was there made that the court below:

> erred in interfering with and assuming jurisdiction over the sovereign right of administration of the said securities imposed by law upon the state of New York through its proper administrative officer (p. 798).

The circuit court of appeals rejected this argument, but ultimately placed its holding on the ground that the state statute was not intended to conflict with the Bankruptcy Act (p. 799):

> It would require very strong language to compel belief that the state Legislature intended to invite conflict with the constitutional prerogative of the United States in respect of bankruptcies, and to inflict upon the creditors of an insolvent, or any class of them, the useless expenses of a double administration. * * *

Accordingly, the Superintendent of Banks was directed to surrender the deposit to the bankruptcy trustee. To the same effect is *In re Faour*, 72 F. (2d) 719 (C. C. A. 2).

The statutes here involved do not evidence any clearer intent to conflict with the bankruptcy

power than did the statute considered in the *Bajardi* case. Therefore, the claims asserted by respondents are not justified by the statutes relied upon when properly construed; but if the statutes be deemed to justify respondents' position, the statutes are superseded by the Bankruptcy Act. On the ground that the state statute had been superseded, it was held in *Gamble* v. *Daniel*, 39 F. (2d) 447 (C. C. A. 8) that the Department of Commerce of Nebraska was required to surrender to the bankrutcy court assets of an insolvent trust company which the Department had taken for liquidation.

Similarly pertinent is *In re Coney Island Hotel Corp.*, 9 F. Supp. 329 (E. D. N. Y.). In that case the owner of a hotel (mortgagor under a bond and mortgage) filed a petition under Section 77B of the Bankruptcy Act and moved that the Superintendent of Insurance of New York be restrained from proceeding under the New York Schackno Act to recognize the same bond issue. The Superintendent argued that the court could not enjoin him from performing his duties under valid New York statutes and that the Eleventh Amendment prohibited suits against the state and state officials. The court answered these contentions as follows (p. 331):

> * * * the argument advanced ignores the provisions of article 1, § 8, of the Constitution, which empowers Congress to establish uniform laws on the subject of

bankruptcy throughout the United States. Accordingly, national bankruptcy statutes are paramount to any state statute the effect of which may impair or emasculate them.

Accordingly, as between the Schackno Act and the provisions of section 77B of the Bankruptcy Act, no construction of any powers vested in the state superintendent of insurance by the Schackno Act can impair the congressional mandate. Such duties or privileges pursuant to which the superintendent of insurance acts cannot vitiate the constitutional authority vested in Congress. *Stellwagen* v. *Clum*, 245 U. S. 605, 38 S. Ct. 215, 62 L. Ed. 507.*

See also *In re Manbeach Realty Corp.*, 10 F. Supp. 523 (E. D. N. Y.).

We submit, therefore, that on the merits the appellants have no right by virtue of the state law to retain the assets as against the trustee in bankruptcy.

2. For the same reason that the Eleventh Amendment does not bar exercise of bankruptcy jurisdiction over the deposited assets, the Tenth Amendment does not bar such exercise. Since there is a valid exercise of bankruptcy jurisdiction to adjust the rights of security holders, the Tenth Amendment does not operate to preserve the remedies provided by the states for such protection.

* Reversed on other grounds in 76 F. (2d) 126 (C. C. A. 2). The circuit court of appeals expressly refrained from discussing the questions on which the district court decision is cited in the text.

Through 140 years of history, this Court never wavered from its repeated assertion that:

> if the act is within the power confined to Congress, the Tenth Amendment, by its very terms, has no application * * *[10]

For a short period during 1935 and 1936 decisions of this Court took a contrary approach. Its interpretations of the Tenth Amendment in the cases cited cannot, we believe, be reconciled with more recent cases. See *Hopkins Federal Savings & Loan Association* v. *Cleary*, 296 U. S. 315; *United States* v. *Butler*, 297 U. S. 1; *Ashton* v. *Cameron County Water Improvement District*, 298 U. S. 513. Two years after the *Ashton* case, which involved the bankruptcy power, the Court held in *Wright* v. *Union Central Ins. Co.*, 304 U. S. 502, 516:

> In view of our decision that the law is within the bankruptcy power, scant reliance can be placed on the Tenth Amendment. * * *

See *United States* v. *Darby*, 312 U. S. 100, 123–124; Feller "The Tenth Amendment Retires," 27 A. B. A. J. 223 (1941).[11]

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[10] *Everard's Breweries* v. *Day*, 265 U. S. 545, 558. See *Gordon* v. *United States*, 117 U. S. 697, 705; *Champion* v. *Ames*, 188 U. S. 321, 357; *Northern Securities Co.* v. *United States*, 193 U. S. 197; *Hoke* v. *United States*, 227 U. S. 308, 320; *Missouri* v. *Holland*, 252 U. S. 416, 432; *United States* v. *Sprague*, 282 U. S. 716, 733.

[11] There is no substance to the contention (West Virginia brief, pp. 35–40) that the legislative history of Section 67 (f) of the Bankruptcy Act (amended by Section 29 of

CONCLUSION

For the foregoing reasons, the property deposited with the states remained property of Fidelity and is subject to reorganization in the district court.

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the Investment Company Act of 1940) evidences an intention that the deposits in the hands of State officials be not disturbed. The argument seems to be that since Section 67 (f) expressly requires state deposits to be turned over to the trustee only with respect to securities sold after January 1, 1941, Congress must have intended that securities sold before that date would not be turned over to the trustee. This argument misconceives the nature of the change made by Section 67 (f). As the legislative history set out in the West Virginia brief makes clear, the purpose of the amended Section 67 (f) was to set up the following scheme with respect to deposits on contracts sold after January 1, 1941:

(1) The bankruptcy trustee is to administer the assets deposited with the state depositaries;

(2) The preference created by the deposit in favor of local security holders is to be determined and recognized;

(3) The security holders entitled to the preference are not to share in the general estate until all other creditors have received from the estate the same percentages of their claims as that which the secured creditors receive under the State deposit.

The change which occurred was in the third feature of this scheme. Prior to that time, persons secured by the state deposits would have been entitled to realize on their security and to prove a general claim for the deficiency under Section 57 (h) of the Bankruptcy Act. The deficiency claim would participate as a general claim on the same basis as the claims of other security holders who had larger deficiencies or who had no security at all. For instance, if the deposit in a particular state were equal to 80% of the claims of local creditors, the contract holders would realize 80% of their

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claims out of the security and would have a 20% claim for the deficiency against the general estate. The 20% deficiency claim would be entitled to share ratably with the 100% general claims of contract holders who were not secured by any deposit.

The purpose of the amendment to Section 67 (f) was to prevent the inequality indicated by the foregoing illustration. The legislative history evidences no Congressional belief that prior to the passage of Section 67 (f), the first two elements of the scheme mentioned did not already exist. There is nothing in the legislative history to show that Congress thought that without the change the bankruptcy court would have no power to take possession from the state officials and to administer the deposited assets while adjudicating and recognizing the rights created under the state deposits. We have shown that that power exists.

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